

4 Official Opinions of the Compliance Board 147 (2005)

NOTICE REQUIREMENTS – METHOD - ORAL ANNOUNCEMENT OF LEGISLATIVE COMMITTEE’S IMMEDIATE MEETING DURING LAST FEW DAYS OF SESSION, HELD TO BE PERMITTED – OPEN SESSION REQUIREMENT – LEGISLATIVE COMMITTEE MEETING IN ROOM OFF-LIMITS TO GENERAL PUBLIC, HELD TO BE IN VIOLATION – POSTING OF NOTICE THAT COMMITTEE IS HOLDING VOTING SESSION, HELD TO BE PERMITTED IF NO ACTIONS TAKEN TO DISCOURAGE PUBLIC OBSERVATION

July 13, 2005

*Mr. Tom Marquardt
Executive Editor, The Capital*

The Open Meetings Compliance Board has considered your complaint that certain practices related to voting sessions of committees of the General Assembly violate the Open Meetings Act. The complaint, as we construe it in light of your original and a supplementary letter, may be summarized as having three elements: (1) On April 5, 9, and 11, 2005, during the last week of the General Assembly’s 2005 regular legislative session, several committees of the Maryland House of Delegates failed to provide legally adequate notice of their voting sessions. (2) These committees unlawfully held voting sessions in a location, the House lounge, that effectively precluded public observation of the meetings. (3) The practice of some committees to post a sign on the door indicating a voting session discourages attendance, in violation of the Act.

For the reasons stated below, we conclude as follows: (1) The committee voting sessions on April 5 were not separate meetings; they required no notice in addition to the notice of the hearings that had already been given. The committee voting sessions on April 9 and 11 did require notice under the Act. However, during the final few days of a legislative session, when the demands of floor business preclude advance scheduling of voting sessions, the oral announcement by a committee chairman of an immediate voting session does not violate the Act. (2) Holding a voting session in the House lounge violates the Act. (3) Posting a sign indicating that a voting session is in progress does not violate the Act. The Act would be violated if the presence of any particular observer at a voting session caused a committee to delay a vote on a bill or otherwise to discourage that person’s attendance, but we have no evidence that such an improper practice occurred at any of the House committee meetings identified in the complaint.

I

Complaint and Response

This matter began with a generally framed complaint about the voting sessions of legislative committees. The gist of this letter was that members of the public were unlawfully excluded from voting sessions. “During the legislative session, committees conduct open hearings on proposed legislation. However, prior to voting, the committee chairs routinely ask spectators to leave the room and post a sign, reading ‘Voting.’ Although the sign does not state explicitly that the public is banned, it is implicit that they are not allowed to witness the discussion and vote – clearly a legislative function covered by the Open Meetings [Act].” The initial letter went on to acknowledge that “reporters are often allowed to remain in the room, but the law does not discriminate between media and the general public.”

Because this initial letter failed to identify any specific instances of the allegedly illegal practice, the Compliance Board returned the letter, requesting that it be supplemented with an identification of one or more specific instances, by committee and date, in which the practice complained about had occurred. The supplementary letter that promptly followed provided “several examples of voting sessions called by committee chairs by the Maryland House of Delegates that were held in violation of the Maryland Open Meetings Act.” The supplementary letter then identified five House committees that, on April 5, 2005, were “summoned” by their committee chairman “to meet in their respective committee rooms for the purpose of voting on specific legislation.”¹ In addition, the supplementary letter stated that “on April 9 and 11, 2005, House committee chairs summoned delegates from the House floor for a voting session in the House Lounge during session, where the public is not allowed.” The supplemental letter characterized the House committees as having “created a routine that implicitly discourages public attendance and makes it unreasonably difficult, if not impossible, to determine the time, location, and subject of voting sessions. This violates the spirit of the Open Meetings Act because citizens are not allowed to observe ‘the deliberations and decisions’ of a public body.” Elaborating on the objectionable characteristics of this “routine,” the supplementary letter contended that an announcement of a voting session on the floor of the House violated the Act, “because unless someone is present at that moment he or she has no way of knowing when and where the vote will be taken.” The letter further objected to voting sessions held in the House lounge, access to which is restricted. Finally, the letter asked the Compliance Board to address the practice of affixing a sign marked “Voting” to the door of committee

¹ The identified committees were five of the six House Standing Committees: Appropriations, Economic Matters, Environmental Matters, Health and Government Operations, and Ways and Means. The House Judiciary Committee was not identified, nor were any Senate committees.

rooms during voting sessions. The contention, as recounted in a news article accompanying the supplemental letter, is that this signage is intended to, and does, discourage lobbyists and others from observing a nominally open meeting.

In a timely response on behalf of the Senate President and the Speaker of the House, Assistant Attorney General Bonnie A. Kirkland asked the Compliance Board to dismiss the complaint, on the grounds that it failed to allege a specific violation of the Act.² In the alternative, the response asserted that the Act had not been violated.³

The response recounted the circumstances on April 5, when the chairmen of five committees announced voting sessions. One of the committees, Health and Government Operations, had a number of meetings scheduled, including a 3:00 p.m. briefing; the voting session was announced as occurring immediately following the briefing. The other four committees had 1:00 p.m. public bill hearings, with voting sessions to follow at the conclusion of the hearings.

The response also summarized the pertinent developments on April 9 and 11, 2005, regarding the announcement and location of voting sessions. On April 9, the Chairmen of the Health and Government Operations and Ways and Means Committees received permission to take their respective committees off the floor and to the House Lounge. Similarly, on April 11, the last day of the legislative session, the Chairmen of the Appropriations Committee, the Environmental Matters Committee, and the Health and Governmental Operations Committee received permission for the respective committees to be excused to the lounge to hold voting sessions on House bills that had been amended in the Senate.

Concerning the complaint about notice, the response contended that an announcement on the House floor by committee chairmen “is the best, most accurate and up-to-date method of informing interested parties of committee activities, particularly during the more hectic and less predictable period later in the session.”

² Owing to the heavy workload faced by the Office of the Counsel to the General Assembly in the aftermath of the Legislative Session, the Compliance Board granted an extension of time for the response. The response was sent within the period of the extension but then, unaccountably, was not received by the Compliance Board’s counsel. Presumably, the response was lost in the mail. After inquiry, the response was faxed to the Compliance Board’s counsel. The extension and the delay in obtaining the response have resulted in the issuance of this opinion beyond the time period normally allowed for the processing of a complaint.

³ The response implied that the practices related to voting sessions are encompassed within certain constitutional protections for the legislative process. Because the jurisdiction of the Compliance Board is limited to construction of the Open Meetings Act, we express no views on the application of constitutional provisions.

Earlier or more formal notice of voting sessions is impracticable, the response suggested, because “the precise time . . . when a particular committee will meet is usually unknowable given the unpredictable length of the floor sessions on any given day during the legislative session. Adjustments to hearing schedules and voting sessions are routinely made to accommodate unanticipated events, lengthy delays on the floor, and the need for double sessions.”

The response also denied that anyone had been excluded from a voting session, either on April 5 or in general. According to committee staff, “only one committee posted a sign reading ‘Voting’ while the committee is in a voting session, but that . . . sign does not forbid attendance. Some committees post voting lists on boards outside committee rooms much in the way lists of bills being heard are posted. Some staff indicated that voting sessions are frequently attended by members of the press and public.”

The response also contended that recourse to the House lounge by committees on April 9 and April 11 did not violate the Act. The response described the hectic pace during the last few days of the session: “Constitutionally required and recorded votes and quorum calls, for which legislators are needed, are taken throughout these sessions. The precise schedule is often unpredictable because of the priority that certain orders of business take over others. The fate of legislation rests on securing a constitutional majority vote. Thus, it is imperative that legislators be present on the floor or within close proximity to the floor throughout the session.” The response acknowledged that House committee votes on concurrences with Senate amendments are “sometimes taken in the Lounge. The action usually takes a very short amount of time (just a few minutes, in many instances), significantly less than it would take to go to committee rooms across the complex and back. Requiring a committee to leave the floor and State House to go to its committee room for this brief action would almost certainly result in legislators’ missing critical and constitutionally required votes.” The response also pointed out that the complaint had not alleged that any individual attempted to attend a voting session in the House lounge but was prevented from doing so. The response commented that, while the lounge is not open to the public generally, reporters are permitted “and are in a position to act as surrogates for the public in these limited instances.”

II

Notice Issues

A. General Requirements

When a public body meets is up to the body. The Open Meetings Act does not require any minimum interval between notice of a meeting and the holding of it. In other words, assuming good faith, “if . . . a public body needs to schedule a meeting

on short notice, it need not delay the meeting in order to provide a longer period of notice for the public.” 1 *Opinions of the Open Meetings Compliance Board* 186, 189 (1996).⁴ See also, e.g., 4 *OMCB Opinions* 99 (2004).

How a public body gives notice is specified in the Act, but with explicit recognition that departures from the normal requirements might be necessary. The Act ordinarily requires written notice to be given in advance of a meeting. The notice is to be explicit about the date, time, and place of the future meeting. §10-506.⁵ The method of notice ordinarily involves publication, delivery to the news media, or public posting in a designated place. §10-506(c).

Each of these requirements, however, is conditioned on its being “reasonable” under the circumstances. A public body must “give reasonable advance notice” of a future meeting. §10-506(a). “Whenever reasonable,” a notice is to be in writing and include the date, time and place of the meeting. §10-506(b). The methods of notice discussed above are not exclusive, because a public body is permitted to give notice “by any other reasonable method.” §10-506(c)(4). When a public body departs from one of the normal methods of giving notice, the test of reasonableness is whether, under the circumstances, adherence to the generally applicable norm was not feasible.

B. Oral Announcement of Voting Sessions to Follow Scheduled Bill Hearings

On April 5, all of the House committee announcements involved a voting session added to the end of an already scheduled meeting (for bill hearings and, in one instance, a briefing). Absent information to the contrary in the complaint or the response, and given common knowledge of legislative practices, we assume that proper notice was given of these meetings. The announcement that a voting session would occur at the end of the bill hearings was simply an addition to the agenda of the already scheduled meeting; it was not the announcement of a separate and distinct meeting for which additional notice under the Act was required. We have long recognized that public bodies which provide an agenda as an adjunct to a meeting notice are free to change the agenda at any time. See, e.g., 2 *OMCB Opinions* 52 (1999). That is what happened on April 5: The committees held announced meetings, at the end of which an additional activity – voting on bills – took place. There was no violation.

⁴ For brevity’s sake, we shall henceforth refer to our opinions as ___ *OMCB Opinions* ___.

⁵ All statutory references in this opinion are to the State Government Article, Annotated Code of Maryland.

C. Oral Announcement of Voting Sessions to Occur Immediately

On April 9 and 11, we gather, all of the House committee announcements involved a separate and distinct voting session, not one added to the end of an already scheduled meeting. By this time in the legislative session, it is too late for bill hearings. Therefore, notice of the voting sessions was required. Hence, the question is whether oral notice by the chairman, in the form of a request for the committee to be excused from the floor to vote, meets the requirements of the Act. Did the circumstances make the oral floor announcements a reasonable, and so legally permissible, departure from the norm of written advance notice? Under the whirlwind conditions prevailing during the last few days of a legislative session, we hold that such notice is legally sufficient.

As anyone who has participated in or observed the legislative process knows, the last few days of the General Assembly's annual session are a period of intense activity that does not follow a preordained schedule. House committees have no control over the timing of voting sessions, because bills requiring a vote arrive on no set timetable, and lulls in floor action, when committee members might briefly absent themselves from the floor, cannot be predicted. In our opinion, under these circumstances oral notice from the committee chairman during a floor session is reasonable. There is no practical alternative.

III

Openness Issues

A. General Requirements

Unless an exception applies, "a public body shall meet in open session." §10-505. Unlike the provisions on notice, this mandate is not conditioned by a reasonableness standard. The Act does *not* say, "Whenever reasonable, a public body shall meet in open session."

The Act requires an open meeting to be open in practice, not just in theory. *See, e.g., 1 OMCB Opinions* 92 (1994). Those who want to observe must be afforded an opportunity to do so. A public body may not grant access to some members of the public but deny it to others. *2 OMCB Opinions* 67 (1999).

B. Site of Voting Sessions

A public body must hold an open meeting in a site that allows access by the public. *See, e.g., 1 OMCB Opinions* 44 (1993). The House lounge is not such a site, because it is in an area marked as off-limits to members of the public. The fact that

reporters might be allowed into the lounge does not remedy the denial of access to others who would observe. Nor is it pertinent that the committees that held voting sessions in the lounge are unaware of anyone who, having sought to be admitted, was denied. The very fact that the House lounge is behind a sign that bars public access means that the meeting is closed in practice.

The Legislature's response points to the practical difficulty that would arise if committee voting sessions during this period of hectic activity and nearly continuous floor obligations were required to be held in committee hearing rooms, across the street. That is not the import of our opinion. The committees may hold these sessions in the State House, near the House floor, but they must find space in which to do so that allows for public observation. In our opinion, the holding of committee voting sessions in the House lounge violated the Open Meetings Act.

C. Signage on Committee Hearing Room Door

Unlike a sign explicitly barring the public from the House lounge, a sign on a committee's door saying "Voting" itself bars no one. The sign is an accurate piece of information about what the committee is doing, akin to a posted list of the bills assigned for that day's hearings.⁶ The Act obviously does not bar the provision of this information.

The claim made by the complaint, however, is that the "Voting" sign is a coded "Do Not Enter" sign, which if posted in so many words would of course be an unlawful effort to prevent observation of a meeting legally required to be open. According to the news article submitted with the complaint, "an unwritten rule . . . calls for clearing the public out of committee rooms before votes are taken." The article quotes one State Senator who characterized voting sessions as, "by practice, . . . closed." According to the article, this practice is aimed specifically at lobbyists, enforced by a delay in voting until they leave the committee room. Lobbyists, the article states, "largely know the protocol and don't try to hang around," although "lawmakers say it's also common practice to put off voting until the general public scatters" as well. The gist of the complaint, then, is not really about the posting of the "Voting" sign as such but rather about the so-called "unwritten rule" that the sign invokes and committee behavior to enforce it.

The Legislature's response denied that anyone had been excluded from the House committee voting sessions on April 5. More generally, the response reported legislative staff observations that "voting sessions are frequently attended by members of the public."

⁶ The complaint suggested that the posting of this sign is a common practice among committees. The response indicated that "only one committee posts a sign reading 'Voting' while the committee is in a voting session"

Does the “unwritten rule” exist? Apparently, but its contours are not clear. There appears to be agreement that reporters can attend a voting session without any untoward response from the committee. There is disagreement whether the presence of citizens who are not known to be lobbyists has any effect. Most likely, based on the variety of on-the-record quotes from lobbyists in the news article, the “unwritten rule” is mainly known and observed by lobbyists, whose stock-in-trade is the goodwill of legislators. To avoid irritating them, many lobbyists apparently conform to this Annapolis folkway and absent themselves from voting sessions.

We are not arbiters of lobbyist etiquette. Lobbyist forbearance from attending an open meeting does not equate to a committee’s violation of the Open Meetings Act.

What *would* violate the Act is committee behavior to enforce the “unwritten rule.” Any direct effort to “clear the public out of committee rooms before votes are taken,” in the words of the news article, would violate the Act. So would the indirect step of delaying voting until an unwanted observer leaves. Either of these actions would be inconsistent with the open meetings mandate in §10-505. There is no evidence, however, that any action was taken to deter a lobbyist’s or anyone else’s attendance at the April 5 voting sessions. Hence, we find no violation at these meetings.

IV

Conclusion

In summary, we hold that the House committees did not violate the Act by making oral announcements of voting sessions from the floor or by posting a “Voting” sign during a voting session. However, the House committees violated the Act by holding voting sessions in the House lounge.

OPEN MEETINGS COMPLIANCE BOARD

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